Supreme Court, U.S.
FILED
JAN 4 2000

Jan 4 2000

Nos. 99-244 and 99-253

IN THE

Supreme Court of the United States

MOBIL OIL EXPLORATION & PRODUCING SOUTHEAST, INC.,
AND
MARATHON OIL COMPANY,

Petitioners,

v.

THE UNITED STATES,

Respondent.

On Writ of Certiorari To the United States Court of Appeals For the Federal Circuit

BRIEF FOR PETITIONER MOBIL OIL EXPLORATION & PRODUCING SOUTHEAST, INC.

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QUESTION PRESENTED

Whether the Federal Circuit erred in holding – contrary to decisions of this Court, other courts of appeals, and state courts, as well as the *Restatements* and leading treatises – that petitioner could not obtain restitution of the $78 million paid to the United States for oil and gas leases following the enactment of a statute that the trial court found "clearly reduce[d] the value and materially alter[ed] the structure and framework" of those leases, because (1) petitioner had not proved that this material breach of its leases "caused" it any injury and (2) Congress had repealed the statute after petitioner filed suit asserting material breach?

PARTIES TO THE PROCEEDING AND AMENDED RULE 29.6 DISCLOSURE

The following were parties to the proceeding in the court of appeals: The United States, Mobil Oil Exploration & Producing Southeast, Inc., and Marathon Oil Company.

All of the stock of Mobil Oil Exploration & Producing Southeast, Inc., is owned by its immediate parent, Mobil Exploration & Producing North America Inc. All of the stock of Mobil Exploration & Producing North America Inc. is owned by Mobil Corporation, and all of the stock of Mobil Corporation is, in turn, owned by ExxonMobil Corporation, a publicly held company.

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BRIEF OF PETITIONER
MOBIL OIL EXPLORATION & PRODUCING SOUTHEAST, INC.

OPINIONS BELOW

The initial opinion of the court of appeals is reported at 158 F.3d 1253. Petition Appendix ("Pet. App.") 22a. The revised opinion of the court of appeals is reported at 177 F.3d 331. Pet. App. 1a. The order of the court of appeals granting the petition for rehearing for the limited purpose of revising the court's initial opinion and denying the suggestion of Mobil Oil Exploration & Producing Southeast, Inc. ("Mobil") for rehearing in banc is also reported at 177 F.3d 331. Pet. App. 94a. The April 1, 1996, opinion of the United States Court of Federal Claims, which was reversed by the court of appeals, is reported at 35 Fed. Cl. 309. Pet. App. 40a.

JURISDICTION

The decision of the court of appeals that was the subject of the petition for a writ of certiorari was entered May 13, 1999. That decision revised the court of appeals' October 15, 1998, opinion pursuant to a timely petition for rehearing filed on November 25, 1998. The petition for a writ of certiorari was filed on August 10, 1999, and granted on November 15, 1999. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant provisions of the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. § 1331 *et seq.*, and of the Outer Banks Protection Act ("OBPA"), Pub. L. No. 101-380, § 6003, 104 Stat. 484, 555 (1990), *repealed by* Pub. L. No. 104-134, 110 Stat. 1321-177 (1996), appear in the Addendum to this brief.

STATEMENT OF THE CASE

Mobil and Marathon Oil Company ("Marathon"), petitioner in No. 99-253, each paid the United States more than $78 million in 1981 to acquire one-third interests in five oil and gas leases on the Outer Continental Shelf ("OCS") offshore North Carolina.[1] Fed. Cir. App. 180-81, 183-84. In 1990, Congress enacted the OBPA, which the Court of Federal Claims found "compelled governmental breach by non-performance accompanied by an anticipatory repudiation thereby giving a rise to 'total breach.'" Pet. App. 71a. The Federal Circuit held that, notwithstanding this "find[ing]," Mobil and Marathon were not entitled to restitution of the monies that they had paid to the Government for their leases because they had not proved that the OBPA, prior to its 1996 repeal, was the exclusive "cause" of their inability to explore the oil and gas resources on the North Carolina OCS.

The Facts Giving Rise To This Case

The OCSLA authorizes the United States Department of the Interior ("DOI") to sell leases that "*entitle* the lessee [*inter alia*] to explore [for] ... oil and gas" on the OCS, subject only to the lessee's due diligence. 43 U.S.C. § 1337(b)(4) (emphasis added). Section 1 of Mobil's and Marathon's leases provides that they are issued "pursuant to" and "subject to" the OCSLA. OCS Lease § 1, Marathon Pet. App. 175a. Thus, consistent with § 1337(b)(4), the leases give "the lessee the exclusive right and privilege to drill for, develop, and produce oil and gas resources ... in the submerged lands of the [OCS]." OCS Lease § 2.

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[1] Amerada-Hess Corporation, which settled its claims against the United States, *see* p. 13 n.12, *infra*, held the remaining one-third interest in the five leases.

Before conducting a sale of OCS leases, DOI assesses all the environmental impacts that are expected following the sale, as required by the OCSLA, 43 U.S.C. § 1346(a), and the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq*. Following such an assessment, DOI conducted a lease sale in August 1981 at which Mobil and Marathon bought their interests in the five North Carolina OCS leases. Fed. Cir. App. 180-81, 183-84. In total, the Government collected more than $350 million in bonus payments at that sale. *Id.* at 186.[2] The leases purchased by Mobil and Marathon have 10-year primary terms and are extended for as "long thereafter as oil or gas is produced ... in paying quantities." OCS Lease § 3, Marathon Pet. App. 176a.

The first step toward oil and gas production under an OCS lease is the submission to DOI of a plan of exploration ("POE"). Under OCSLA § 1340(c)(1), DOI "*shall*" approve a POE within 30 days after it is submitted, unless the proposed activities (1) "would probably cause serious harm or damage" to the environment, *see* OCSLA § 1334(a)(2), and (2) those activities cannot be modified to avoid such harm or damage. In these circumstances, which have *never* occurred in the history of the OCS leasing program, J.A. 176, DOI may cancel the lease and pay the owner the compensation specified in OSCLA § 1334(a)(2)(C) – *i.e.* the lesser of compensation for all expenditures on the leases with

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[2] *See Watt v. Energy Action Educ. Found.*, 454 U.S. 151 (1981) (upholding DOI's front-end cash bonus system for issuing OCS leases). Under the OCS leasing program (1953-present), the Government has received more than $60 billion in up-front bonuses alone. *See* U.S. Department of the Interior Minerals Management Service, Mineral Revenues 1998, at 51 tbl.20 (1999) (visited Dec. 7, 1999) <http://www.rmp.mms.gov/library/statroom/PDFDocs/mrr98fin.pdf>. The Government has also received $61.5 billion in royalties and $1.7 billion in rents over the life of the program. *See id.* at 35, 48-49, tbls.13 & 18.

interest or the fair market value of the leases. As the Government has conceded,[3] the 30-day period for POE approval means that DOI cannot undertake new environmental studies to decide whether to approve a POE. Moreover, OCSLA § 1346(d) requires DOI to base its decision on the information that is "available" at the time of its POE decision. *See also* Marathon Pet. App. 201a.[4]

Under OCSLA § 1340(c) and § 1 of its leases, *see* p. 2, *supra*, Mobil was entitled to have a POE approved within 30 days. However, in 1989, acting on behalf of Marathon and six other companies holding North Carolina OCS leases, Mobil agreed with DOI and the State to submit a "draft" POE for what would have been the first exploratory well offshore North Carolina in order to give DOI an opportunity to prepare an analysis of the environmental impacts associated with the proposed well. J.A. 79-85. The *2000-page* Environmental Report produced by DOI in June 1990 constitutes, in DOI's own words, "the most extensive and intensive environmental examination that had ever been afforded an exploration well in the OCS program." J.A. 179. After reviewing that report, DOI determined that Mobil's proposed exploration would not result in any significant

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[3] *See* Letter of February 28, 1990, from Michael Deland, Chairman of the Council on Environmental Quality to Rep. Walter Jones (Exh. 6 to Third Party Plaintiff's Motion for Partial Summary Judgment, filed April 12, 1994).

[4] If exploration is successful, lessees submit plans of development ("PODs") before proceeding with development and production of oil or gas. DOI may disapprove a POD, *inter alia*, if development and production "would probably cause serious harm or damage ... to the marine, coastal or human environments." OCSLA § 1351(h)(1)(D). If DOI disapproves a POD for this reason and it cannot be modified to avoid such risk of harm, DOI must ultimately cancel the lease and pay compensation to the lessee. OCSLA § 1351(h)(2)(C).

environmental impacts. J.A. 139-40, 179. Accordingly, Mobil's POE was deemed to have "complied in all respects with [DOI] regulations ... governing [POEs]," and "[t]he Plan, together with its supporting information, [was] deemed to be approvable in all respects." Marathon Pet. App. 194a.

However, on August 18, 1990, the day before Mobil submitted its "final" POE to DOI, Congress enacted the OBPA. That Act, without amending the OCSLA – and, indeed, being directed solely at the North Carolina OCS leases – prohibited DOI from approving any POE, POD, or permit to drill until the later of October 1, 1991, or 45 days of continuous congressional session following the Secretary's submission to Congress of a certificate that he had received a report from the Environmental Sciences Review Panel established by the OBPA and had concluded that sufficient information was available to allow him to carry out his responsibilities under the OCSLA.

The legislative record clearly reveals the intent underlying the OBPA. Prior to 1990, congressional appropriations moratoria had prohibited exploration on OCS leases offshore Florida and Alaska.[5] In June 1990, President

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[5] *See, e.g.*, Pub. L. No. 100-46, § 110, 102 Stat. 1774, 1801 (1988) (Florida); Pub. L. No. 101-121, § 111, 103 Stat. 701, 702 (1989) (Alaska). The Florida and Alaska moratoria prompted the filing of claims by two other Mobil affiliates, as well as other companies that were originally plaintiffs in this litigation. Before the issues raised in those claims were decided, the Government paid nine of those plaintiffs $175 million, representing more than 100% of the bonuses and rentals that they had paid for their leases, in return for cancellation of their OCS leases. Fed. Cir. App. 973. The Government also paid Conoco Inc. $16.9 million to resolve its Alaska, Florida, and North Carolina claims, *id.* at 982, and it settled all of the claims of Shell Oil Company subsidiaries for undisclosed consideration, *id.* at 986.

Bush directed DOI to "[b]egin cancellation of *existing* leases off Florida" and to compensate the leaseholders by implementing a "joint federal-state buy-back" of those leases. J.A. 100. Representative Walter Jones of North Carolina, then Chairman of the House Merchant Marine and Fisheries Committee, vigorously protested the omission of the North Carolina OCS from the President's "moratorium," J.A. 102, as did North Carolina's Governor, J.A. 104. However, in July 1990, the House Appropriations Subcommittee rejected Rep. Jones' request for a ban on exploration offshore North Carolina, like those imposed on Florida and Alaska leases.

In response, Rep. Jones "managed to wrangle" the OBPA into the Oil Pollution Act of 1990, 33 U.S.C. § 2701 *et seq.*, over which his committee had jurisdiction. 136 Cong. Rec. 22,281 (1990) (Rep. Studds); *see also* id. at 22,275 (Rep. Regula) ("[The OBPA] was not in the House bill, was not in the Senate bill, was not within in the scope of the conference. It was simply added."); *id.* at 21,726 (1990) (Sen. Dole) (observing that the bill "includes a last minute moratorium on a promising lease in the Outer Continental Shelf").

Rep. Jones and the OBPA's other supporters made clear that they intended to achieve for North Carolina a "moratorium" like those that Congress had adopted for Florida and Alaska. *See, e.g.*, H.R. No. 101-653, 101st Cong., 2d Sess. 163 (1990) (Conf. Report) (describing the OBPA as a "moratorium"). In successfully opposing a separate floor vote on the OBPA, Rep. Jones stated that "in his offshore moratoria proposal, the President has forgotten about North Carolina. Well, I have not." 136 Cong. Rec. 22,275 (1990). Representative Rose of North Carolina likewise explained the purpose of the OBPA:

> Governor Martin . . . was horrified when the President stopped offshore drilling off the coast of ... Florida and left North Carolina out. And so he ... wrote to Mr. Jones, and Mr. Jones did exactly what [Governor Martin] asked him to do, he put [the OBPA] in this legislation.

Id. at 22,277 (Rep. Rose); *see also id.* at 22,272 (Rep. Miller) (describing the OBPA as a "moratorium"); *id.* at 22,278 (Rep. Young) (same); *id.* at 22,279 (Rep. Lagomarsino) (same); J.A. 113 (DOI Secretary Lujan denouncing the OBPA as a "*de facto* moratorium on any exploratory activity").

The legislative record also makes clear that the OBPA was aimed specifically at Mobil's proposed exploratory well:

> Although encompassing the entire area offshore the State of North Carolina, the [OBPA] essentially addresses the proposal by the Mobil Oil Corporation and seven partners to drill an exploratory well about 40 miles off Cape Hatteras.

H.R. No. 101-653, 101st Cong., 2d Sess. 161 (1990) (Conf. Report); *see also* OBPA § 6003(b)(7) (referring by name to DOI's June 1990 Environmental Report prepared pursuant to an agreement with "the Mobil Oil Company"); 136 Cong. Rec. 22,275 (Rep. Regula noting that the "real issue" underlying the OBPA was Mobil's proposed well).

In these circumstances, it is hardly surprising that DOI Assistant Secretary O'Neal, the official with direct responsibility for the OCS program, described the OBPA as an act of "bad faith" that had "no scientific basis" and was inconsistent with the terms of the North Carolina OCS leases. J.A. 182.

Application Of The OBPA

Although OBPA § 6003(e)(2) required the newly established Review Panel to submit a report to the Secretary by February 19, 1991, that report was not completed until January 22, 1992. J.A. 149. Moreover, contrary to the OBPA, the panel did not focus on the Secretary's responsibilities under the OCSLA regarding exploration. For example, the panel recommended extensive studies focusing on the impacts of onshore development, even though approval of the Mobil POE could not cause such impacts. J.A. 158-60.[6]

Following receipt of the Panel's report, Secretary Lujan certified on April 2, 1992, that "the information that currently exists is adequate to allow me to make a reasoned decision about the activities presently proposed [*i.e.*, the Mobil POE] to take place offshore North Carolina." Marathon Pet. App. 201a. Despite this unqualified conclusion, the Secretary refused to allow drilling of even the single well proposed in Mobil's POE until the completion of all the studies recommended by the Panel. *Id.* at 415. The last of those studies was not completed until July 1994. J.A. 194.

Moreover, Secretary Lujan's April 1992 decision dealt only with "the first [Mobil] exploratory well." Marathon Pet. App. 201a. DOI estimated that as many as

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[6] Secretary Lujan later recognized in his April 2, 1992, report to Congress under the OBPA that the Panel's "definition of adequacy [of environmental information] ... was far more restrictive and narrow than [his] charge under the [OCSLA]"; he also acknowledged that "[t]he OCSLA requires that the timing and location of exploration ... be based on a consideration of existing information ...." Marathon Pet. App. 201a.

eight additional delineation wells would be required just to determine the feasibility of production, and many more wells would have been necessary to produce the underlying oil or gas. J.A. 55. The OBPA Panel had determined that additional studies would be required before deciding whether to permit *any* of these additional wells, Marathon Pet. App. 198a-204a, and the Secretary told Congress that further studies would "not begin in earnest prior to reviewing the initial exploration drilling," *id.* at 201a-202a. Accordingly, the Government conceded below, *see* Federal Circuit Brief at 18, 23, 29-30, that after the Secretary's April 1992 certification the OBPA continued to bar all of these subsequent exploration and development-and-production activities.

After the enactment of the OBPA, Mobil faced another potential barrier to its exploration well based on the Coastal Zone Management Act ("CZMA"), 16 U.S.C. §§ 1451 *et seq.* Pursuant to § 1456(c)(3)(B), North Carolina on November 19, 1990, objected to Mobil's exploratory drilling on the ground that it would not be consistent with the State's coastal management program. J.A. 141.[7] This objection was based in large part upon the OBPA's "findings" that there were insufficient environmental studies to proceed with drilling. J.A. 147. Under the CZMA, DOI was thus barred from issuing the drilling permit contemplated by Mobil's POE, unless Mobil successfully appealed to the Secretary of

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[7] On July 17, 1990, North Carolina also objected to Mobil's application to EPA for a permit under the Clean Water Act ("CWA"), 33 U.S.C. § 1311, for the discharges into ocean waters associated with exploration. J.A. 106. Unlike the State's later objection to Mobil's POE, North Carolina's objection to the CWA permit would not have barred exploratory drilling. *See* J.A. 331 (discussing the State's proposal for a "no discharge" approach contemplating the barging of byproducts and wastes to shore).

Commerce or amended its POE to achieve consistency by conducting the additional studies demanded by North Carolina.[8] On September 2, 1994, the Secretary of Commerce rejected Mobil's appeal. The Secretary's decision, like North Carolina's, was based largely on the OBPA. *See, e.g.*, J.A. 224, 227, 232, 239, 244, 247.[9]

Proceedings In The Court Of Federal Claims

Confronted with Secretary Lujan's April 1992 decision interpreting the OBPA as requiring years of additional studies not only for the first exploration well offshore North Carolina, but also for *every* subsequent exploration, delineation, and production well, Mobil and all the other North Carolina OCS lessees filed suit under 28 U.S.C. § 1491 in the United States Court of Federal Claims. They alleged, *inter alia*, that the enactment and application of the OBPA constituted a material breach by anticipatory repudiation of their leases that entitled them to restitution of all the monies that they had paid to acquire and maintain the leases. *See* Mobil Complaint ¶ 1. The Government defended

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[8] *See Secretary of the Interior v. California*, 464 U.S. 312, 339 (1984) (discussing the application of the CZMA to OCS exploration activities).

[9] Mobil and the other lessees filed an action in District Court challenging the Secretary of Commerce's rejection of their CZMA appeal. In early 1996, the District Court remanded the case to the Secretary of Commerce for a determination whether the administrative record should be reopened to receive the two completed studies required by the OBPA scientific review panel. *Mobil Oil Exploration and Producing Southeast, Inc. v. Secretary of Commerce*, Civ. No. 95-93 SSH (D.D.C.), Order filed March 11, 1996. On December 8, 1999, almost four years after the district court's remand – but only three weeks after this Court granted certiorari in this case – the Secretary of Commerce issued a decision refusing to reopen the record.

principally on the ground that under the terms of the OCS leases, as construed pursuant to the unmistakability and sovereign acts doctrines,[10] the OBPA could be applied to their leases even though it was enacted nine years after they were issued.

On April 1, 1996, the Court of Federal Claims granted summary judgment for Mobil and the other plaintiffs on their material breach theory. Pet. App. 40a. The court rejected the Government's principal argument that § 1 of the leases – making them "subject to" the OCSLA and "all other applicable statutes and regulations" – allowed the Government through future legislation, like the OBPA, to impose new restrictions on OCS activities:

> [T]he lease contracts here at issue cannot be construed to allow for such drastic unilateral interference by the government, through passage of highly restrictive legislation, the OBPA, with the lessees' bargained for rights of exploitation.
>
> * * *
>
> Moreover, common sense suggests that no sophisticated oil and gas company . . . would knowingly agree to pay the huge, upfront considerations here involved for such tenuous and unilaterally interruptible drilling rights.

Pet. App. 62a.

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[10] *See generally United States v. Winstar Corp.*, 518 U.S. 839 (1996).

Having determined that the OBPA was an "external factor" that "cannot be read into [Mobil's] unambiguous lease terms," Pet. App. 63a, the court concluded that the OBPA constituted an anticipatory repudiation and material breach of the companies' OCS leases:

> Clearly, the OBPA imposed severe, burdensome, new conditions upon the DOI's obligation under OCSLA to approve POEs offshore North Carolina, which were not contemplated by the parties when the leases were executed. Therefore, the court … finds that compliance with the OBPA compelled governmental breach by non-performance accompanied by an anticipatory repudiation thereby giving rise to "total breach."

Pet. App. 71a; *see also* Pet. App. 63a (OBPA "clearly reduce[d] the value and materially alter[ed] the structure and framework of plaintiffs' North Carolina lease acquisitions").

The Court of Federal Claims also found that the OBPA "was narrowly tailored to target the specific contracts and sought to abate the accompanying rights here at issue." Pet. App 86a. It thus rejected the Government's argument under the sovereign acts doctrine, holding that the OBPA "was not an act of public, general applicability" but instead was "specifically enacted to delay indefinitely plaintiffs' exploration of the OCS offshore North Carolina." Pet. App. 91a.[11]

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[11] The Government paid so little attention to the CZMA in briefing and arguing summary judgment that the court did not directly address that statute. It did hold, however, that because the OBPA "legislatively barred [DOI] from performing," it was "not necessary for plaintiffs [even] to have actually submitted such (...continued)

Following additional proceedings regarding remedy, judgment was entered for Mobil in the amount of $78,257,565, J.A. 339 – restitution (without interest) of the bonus monies Mobil paid to the Government in 1981 to acquire its North Carolina leases.[12]

Proceedings In The Federal Circuit

The Government appealed to the Federal Circuit. However, in that court the Government abandoned its principal arguments based on its interpretation of the OCS leases, as well as the sovereign acts and unmistakability doctrines, thus conceding that the OBPA was targeted at and inconsistent with Mobil's lease rights. Instead, as the last of its three arguments, the Government contended that the OBPA could not sustain Mobil's claims of material breach and restitution because Mobil was independently barred by the CZMA from obtaining the drilling permit necessary to conduct the exploration contemplated by its POE. In advancing this argument, the Government did not contend that the repeal of the OBPA on April 26, 1996, nearly a month after the Court of Federal Claims' decision, could in

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exploration plans because it is clear defendant cannot and will not perform its end of the bargain as required by the OCSLA." Pet. App. 73a. Had Mobil simply filed suit without filing a POE or seeking permits from EPA under the CWA, the CZMA would never have come into play in this case.

[12] Judgment was similarly entered on behalf of Marathon. J.A. 340. At the time of the decision on liability, Mobil and Marathon were joined by their co-lessee Amerada-Hess and four other lessees. Ultimately, those companies dismissed their claims, while retaining their North Carolina OCS leases, pursuant to judgments that totalled $80.9 million, representing 50% of the bonuses and rentals that they paid for those leases. Fed. Cir. App. 965-66, 969-70.

any way relieve it from liability for the material breach declared by that court.[13]

On October 15, 1998, a majority of the Federal Circuit panel (Judges Plager and Schall, with Judge Newman dissenting) reversed the Court of Federal Claims' judgment. The panel majority expressly "agree[d]" with that court's "find[ing]" that the OBPA was inconsistent with Mobil's lease agreement. Pet. App. 31a. However, the court of appeals did not "dwell upon" the breach issue because it concluded that "the outcome of the case d[id] not turn on this issue." Pet. App. 31a.

Instead, the court of appeals rested its reversal exclusively upon the impact of the CZMA on Mobil's POE. Mistakenly characterizing Mobil's suit as seeking to recover "damages" for the "delay" in approving its POE precipitated by the OBPA, the panel majority held that the North Carolina's CZMA consistency objection was an independent "cause" of the delay and cited five cases holding that claims for "delay damages" should be rejected where there is an independent cause of delay not attributable to the acts of the defendant. Pet. App. 33a-34a. To further support its denial of "delay damages," the panel majority construed the OCS leases as placing an obligation upon Mobil to achieve CZMA consistency and as giving the Government the right to cancel such leases in the event that consistency is not achieved. Pet. App. 31a-32a, 37a. Finally, the panel majority relied upon a

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[13] *See* 141 Cong. Rec. 26,033 (Sept. 21, 1995) ("The repeal [of the OBPA] is not intended to excuse the United States from the liabilities, if any, it has incurred to date nor to otherwise affect pending litigation."); *cf.* 1 U.S.C. § 109 ("The repeal of any statute shall not have the effect to release or extinguish any ... liability under such statute, unless the Repealing Act shall so expressly provide.").

provision of the OCSLA, 43 U.S.C. § 1351(h)(2), which denies compensation under that Act if a CZMA consistency objection bars approval of a POD for development and production, as opposed to exploration. Pet. App. 36a-37a.[14]

Mobil sought panel rehearing and suggested rehearing in banc. The petition pointed out that the court had erred in characterizing Mobil's suit for restitution as one for "delay damages." Mobil also argued that the court had misconstrued the relevant provisions of the OCS leases with respect to Mobil's purported obligation to achieve CZMA consistency, as well as the OCSLA with respect to the award of compensation where a CZMA consistency objection bars OCS exploration.[15]

On May 13, 1999, the panel majority (with Judge Rader replacing Judge Schall, who recused himself on rehearing) issued a revised opinion. Although continuing to "agree" with the trial court's finding that the OBPA could not be reconciled with the terms of Mobil's leases, Pet. App. 9a-10a, the court of appeals reaffirmed its decision to reverse. The court excised its erroneous discussion of delay damages and its misconstruction of the OCS leases and the OCSLA, while offering no new rationale for its decision.[16] Stripped of

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[14] Judge Newman's dissent followed the lines of one of the arguments advanced by Mobil in its brief: that a CZMA consistency objection would not preclude the restitution sought by the companies since, at most, it raised an issue of impossibility of performance which under settled law would require restitution of their bonuses. Pet. App. 38a-39a.

[15] As to the latter, Mobil showed that a CZMA consistency objection at the exploration stage is governed by OCSLA § 1340(c), which, unlike § 1351(h)(2), is silent regarding statutory compensation.

[16] Judge Newman reiterated her dissent, albeit in more expansive terms. Pet. App. 17a-21a.

the underpinnings provided in its initial opinion, the panel majority's ultimate decision was expressed as follows:

> Lessees have not established that their inability to obtain secretarial approval of the POE and to undertake exploratory activity *was caused by the moratorium* rather than by the fact that they were unable to provide the necessary state concurrence to their certification of CZMA compliance. * * * The trial court viewed the moratorium imposed by the OBPA as having indefinite duration and unavoidable consequences. In fact, appellees' failure to overcome North Carolina's objections *resulted in a delay that preceded and extended throughout the period in which the OBPA was effective.*

Pet. App. 12a-13a (emphasis added). Accordingly, the rationale for the court of appeals' decision in this case rests upon two related propositions – (1) that Mobil had not established that the OBPA, as opposed to the CZMA, "caused" DOI to withhold approval of the POE and (2) that the OBPA's repeal during the pendency of North Carolina's CZMA objection absolved the Government from liability.

SUMMARY OF ARGUMENT

1. The Court of Federal Claims correctly found that the OBPA constituted an anticipatory repudiation of Mobil's OCS leases giving rise to "total breach." By enacting the OBPA, whose text and legislative history reveal was targeted specifically at Mobil's proposed exploratory well, the Government breached its duty under the leases to approve POEs, PODs, and other permits "pursuant to" and "subject to" the OCSLA. Because the new conditions imposed under the OBPA applied to *every* POE, POD, and drilling permit on

the North Carolina OCS through the life of the leases, the OBPA effected a wholesale restructuring of the bargain struck between the Government and Mobil in 1981.

2. Having expressly "agree[d]" with the Court of Federal Claims that the conditions imposed by the OBPA were inconsistent with the terms of Mobil's lease, the Federal Circuit did not question that restitution is an appropriate remedy for such an anticipatory repudiation. Instead, the Federal Circuit denied Mobil's claim to restitution on the ground that Mobil had not proved that the OBPA was the "cause" of its loss under the contract. The panel majority clearly erred in engrafting onto the law of restitution an unprecedented "causation" requirement.

a. The case law of this and other courts, as well as the black letter law reported by the *Restatement* and contract-law scholars, make plain that a party has an absolute right – without regard to "causation" – to obtain restitution following an anticipatory repudiation like the one here. This is in stark contrast to the role that causation plays in the expectation damages context, where recovery may be had only for losses that would not have occurred "but for" the breach.

b. Corollary rules of contract law further confirm the irrelevance of "causation" to restitution. It is settled that even a plaintiff who could not himself have performed – and thus could not have obtained expectation damages – may nonetheless obtain restitution, even though the plaintiff's own inability to perform would have "caused" its loss. Similarly, a plaintiff may obtain restitution even on what is, from the plaintiff's perspective, a losing contract, for example, where market forces – and not the defendant's breach – "cause" a plaintiff's loss.

c. The Federal Circuit's causation requirement is inconsistent with the policies and purposes of restitution. Unlike expectation damages, which are forward-looking (and thus entail a causation requirement), restitution is backward-looking and seeks to restore both parties to the position they occupied before the contract was made. Given restitution's backward-looking cast, it is irrelevant whether some external factor might later have frustrated Mobil's exploration, development and production plans under its leases.

3. The Federal Circuit's conclusion that the repeal of the OBPA in 1996 – four years after Mobil filed suit – absolves the Government of responsibility for its breach, is plainly wrong. Under settled law, by bringing suit in 1992, Mobil extinguished the Government's right to retract its repudiation.

4. The Federal Circuit's decision, if allowed to stand, would adversely affect government contracting. Not only would the decision undermine the integrity of thousands of existing government contracts involving tens of billions of dollars, it would also chill future government contracting by opening up opportunities for the Government to repudiate its agreements with impunity. The decision would therefore fundamentally undermine what this Court in *Winstar* described as "the Government's own long-run interest as a reliable contracting partner in the myriad workaday transactions of its agencies."

ARGUMENT

The Federal Circuit's rationale in denying Mobil the restitution that it sought based upon the enactment and application of the OBPA is summed up in the last sentence of the introductory paragraph of the court's opinion: "Because the moratorium legislation [the OBPA] was not the *operative cause* of [Mobil's and] Marathon's failure to obtain the

required permits, the judgment of the Court of Federal Claims is reversed." Pet. App. 2a (emphasis added). The court of appeals' reliance upon causation to defeat a claim of restitution is inconsistent with two fundamental contract-law principles that, taken together, control this case. First:

> The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been … a citizen.

The Sinking-Fund Cases, 99 U.S. (9 Otto) 700, 719 (1879). And second:

> It is an invariably true proposition that whenever one of the parties to a special contract not under seal has, in an unqualified manner, refused to perform his side of the contract, or has disabled himself from performing it by his own act, the other party has thereupon a right to elect to rescind it, and may, on doing so, immediately sue on a quantum meruit for anything he had done under it previously to the rescission.

Ankeny v. Clark, 148 U.S. 345, 353 (1893).

In 1981, the United States Government and Mobil entered into lease contracts whereby Mobil paid the Government more than $78 million for "the exclusive right and privilege to drill for, develop, and produce oil and gas resources" on terms and conditions "pursuant to" and "subject to" the OCSLA. In 1990, in enacting the OBPA, the Government anticipatorily repudiated its obligations under the leases by "impos[ing] severe, burdensome, new

conditions upon DOI's obligation[s] under OCSLA." Pet. App. 71a. Pursuant to *The Sinking-Fund Cases* and *Ankeny* and the common law principles that those cases embrace, Mobil is entitled to restitution of its bonus payment.

I. THE OBPA IMPOSED NEW CONDITIONS INCONSISTENT WITH THE TERMS OF MOBIL'S LEASES AND THEREBY REPUDIATED THOSE LEASES.

The Federal Circuit majority never questioned the Court of Federal Claims' express "find[ing]" that "the OBPA compelled governmental breach by non-performance accompanied by an anticipatory repudiation thereby giving rise to 'total breach.'" Pet. App. 71a. On the contrary, the Federal Circuit "agree[d]" that the new conditions imposed by the OBPA could not be reconciled with the terms of Mobil's leases. Pet. App. 9a-10a. In so concluding, both the Court of Federal Claims and the Federal Circuit followed settled law.

It is a fundamental precept of the common law of contracts that "language that under a fair reading 'amounts to a statement of intention not to perform except on conditions which go beyond the contract' constitutes a repudiation." *Restatement (Second) of Contracts* § 250 cmt. b (1981) (quoting Uniform Commercial Code § 2-610 cmt. 2).[17] This rule has been consistently applied by federal and state courts. *See, e.g., VanHaaren v. State Farm Mut. Auto. Ins. Co.*, 989 F.2d 1, 6 (1st Cir. 1993) ("A contracting party's insistence ... on preconditions to performance not stated in the contract,

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[17] Government contracts are controlled by the federal common law of contracts, *see United States v. Allegheny County*, 322 U.S. 174, 183 (1944), which, in turn, is informed by "the principles of general contract law," *Priebe & Sons, Inc. v. United States*, 332 U.S. 407, 411 (1947).

constitutes a breach by anticipatory repudiation."); *Placid Oil Co. v. Humphrey*, 244 F.2d 184, 188 (5th Cir. 1957) (same, where an oil lessor demanded new tests by a lessee); *Millis Constr. Co. v. Fairfield Sapphire Valley, Inc.*, 358 S.E.2d 566, 569-70 (N.C. Ct. App. 1987) ("[I]f a party to the contract states that he cannot perform except on some condition which goes outside the terms of his contract then the statement will constitute a repudiation.").[18]

Mobil's leases were expressly issued "pursuant to" and "subject to" the OCSLA. *See* p. 2, *supra* (quoting OCS Lease § 1). In so incorporating the provisions of the OCSLA, the leases "obligat[ed]" DOI to "timely and fairly consider ... exploration plans properly submitted," Pet. App. 71a, because OCSLA § 1340(c)(1) commands that POEs like Mobil's "shall" be acted upon within 30 days, *see* p. 3, *supra* (quoting OCSLA § 1340(c)(1)). By withholding action on Mobil's POE in light of the new requirements of the OBPA, the Government refused "to perform except on conditions which [went] beyond the contract" and thereby repudiated the lease agreement. *Restatement (Second) of Contracts* § 250 cmt. b; *see also Ankeny*, 148 U.S. at 353 (holding that a party repudiates a contract where he "disable[s] himself from performing it by his own act"). Moreover, because the OBPA applied not only to Mobil's first POE, but also to *every* single POE (of which there could be many) and POD (of which there could be several), as well as to *every* other permit to drill associated with exploration, production, and development of oil or gas on the North Carolina OCS during the life of Mobil's leases, the Government's anticipatory

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[18] *Accord, e.g., Unique Sys., Inc. v. Zotos Int'l, Inc.*, 622 F.2d 373, 376-77 (8th Cir. 1980); *Chamberlin v. Puckett Constr.*, 921 P.2d 1237, 1240 (Mont. 1996); *Koski v. Eyles*, 440 A.2d 317, 319 (Conn. Sup. Ct. 1981).

repudiation affected its entire contractual relationship with Mobil.

Finally, the extraordinary nature of the United States' breach in this case is demonstrated by the fact that the OBPA on its face, *see, e.g.*, § 6003(b)(7) (referring to "the Mobil Oil Company" by name), and by its history, *see* pp. 5-7, *supra*, was unquestionably "designed to target" Mobil's lease rights. *See Yankee Atomic Elec. Co. v. United States*, 112 F.3d 1569, 1575 (Fed. Cir. 1997), *cert. denied*, 118 S. Ct. 2365 (1998); *see also Sun Oil Co. v. United States*, 572 F.2d 786, 817 (Ct. Cl. 1978) (denial of OCS drilling permits was not a "sovereign act" because it was "directed principally and primarily at plaintiff's contractual right"). By abandoning its argument under the sovereign acts doctrine following this Court's decision in *Winstar*, the Government conceded that the OBPA was not an act of general applicability but was instead, as the Court of Federal Claims found, "narrowly tailored to target" Mobil's leases, Pet. App. 86a, and "specifically enacted to delay indefinitely plaintiffs' exploration of the OCS offshore North Carolina," Pet. App. 91a.[19]

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[19] The Government's only argument contesting the Court of Federal Claims' finding of "material breach" is that the OBPA did not "go[] to the essence of the contract and defeat its object," Op. Cert. 12, because "at all times, petitioners were disabled from proceeding" by the CZMA, *id.* at 13. In this respect, the Government conflates the question of breach of contract and the causation of Mobil's damages associated with the OBPA, just like the Federal Circuit. *See* Pet. App. 16a ("[T]he OBPA was not the cause of [Mobil's and] Marathon's inability to obtain ... approvals for [the] proposed oil exploration, and there is no evidence of a breach of contract by the United States."). The only case cited by the Government in support of its material breach argument, *Sun Oil Co.*, 572 F.2d at 804-06, *see* Op. Cert. 13, involved delay damages, not claims for restitution based on material breach.

II. FOLLOWING THE GOVERNMENT'S ANTICIPATORY REPUDIATION, MOBIL HAD AN ABSOLUTE RIGHT – WITHOUT REGARD TO CAUSATION – TO RESCIND THE CONTRACT AND OBTAIN RESTITUTION OF ITS BONUS PAYMENTS.

The Federal Circuit did not and could not question that restitution is, as a general matter, an appropriate remedy for a material breach by anticipatory repudiation. *See e.g.*, *Stone Forest Indus., Inc. v. United States*, 973 F.2d 1548 (Fed. Cir. 1992) (granting restitution of up-front payments for timber rights following the enactment of a new statute that prevented access to timber lands). Instead, the court of appeals held that Mobil was not entitled to such relief because it had "not established that [its] inability to obtain secretarial approval of the POE and to undertake exploratory activity was *caused* by the [OBPA] moratorium rather than by the fact that [it was] unable to provide the necessary state concurrence to [its] certification of CZMA compliance." Pet. App. 12a (emphasis added).[20] The Federal Circuit's reliance on North Carolina's objection as an independent and

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[20] The Federal Circuit's emphasis on the CZMA as the "cause[]" of Mobil's loss permeates its opinion. *See, e.g.*, Pet. App. 2a, quoted at pp. 18-19, *supra*; Pet. App. 12a ("[T]he OBPA essentially *had no effect* upon these OCS leases because exploration could not proceed without North Carolina's concurrence in the POE's CZMA consistency certification ....") (emphasis added); Pet. App. 13a ("[A]ppellees' failure to overcome North Carolina's objections *resulted* in a delay that preceded and extended throughout the period in which the OBPA was effective.") (emphasis added).

supervening "cause[]" of Mobil's loss confounds clearly established law.[21]

A. Pursuant To Black Letter Law Embraced By This Court, Mobil Had An Absolute Right To Obtain Restitution Following The Government's Anticipatory Repudiation.

The Federal Circuit's focus on causation would have been appropriate if Mobil were seeking "delay damages," as the panel majority mistakenly believed in its initial opinion. Pet. App. 33a-34a.[22] But as Mobil pointed out in its rehearing petition in the Federal Circuit and as the panel majority effectively acknowledged by amending its opinion on rehearing, Mobil was *not* seeking delay damages based upon DOI's failure to act upon its POE as required by OCSLA § 1340(c). Instead, as Judge Newman correctly observed in her dissent below, Mobil "just wants its money back." Pet. App. 17a.

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[21] The court's holding that the CZMA was the actual "cause[]" of Mobil's "inability to obtain secretarial approval of the POE" and that the OBPA therefore "essentially had no effect" on Mobil's lease rights, *see* Pet. App. 11a-12a, also misunderstands the undisputed facts of the case. North Carolina's CZMA objection concerned only Mobil's POE for the first exploratory well offshore North Carolina and was based on matters – *i.e.*, the purported lack of studies for the first drilling activities offshore North Carolina – which were curable and would not have been the basis for North Carolina's objection to later POEs or PODs. J.A. 259-60 (denial of Mobil POE would not preclude the submission of other POEs). The OBPA, by contrast, fundamentally changed the terms and conditions of the leases as to *all* future drilling activities conducted by Mobil.

[22] Delay damages are a form of lost profits or "expectation" damages, seeking recovery for the added costs or lost revenues caused by the delay. 5 John C. McBride & Thomas J. Touhey, *Government Contracts*, § 37A.10 at 37A-1 (1998).

It is axiomatic that "on a repudiation, the injured party is entitled to restitution for any benefit that he has conferred on the other party." *Restatement (Second) of Contracts* § 373; *accord Restatement of Restitution* § 108(a) (1937) ("A person who has conferred a benefit upon another in the performance of a contract or bargain with the other which the other has failed to perform is entitled to restitution … if the other has committed a material breach of contract."); 5 Arthur L. Corbin, *Corbin on Contracts* § 1104, at 560 (1951) ("In the case of a repudiation there is no doubt that the injured party [may obtain] restitution of such value as he may have already conferred upon the repudiator."); II E. Allan Farnsworth, *Farnsworth on Contracts* § 8.20, at 527 n.3 (2d ed. 1998) ("It is … clear that an anticipatory repudiation gives the injured party an immediate claim to restitution.").

This Court has long recognized this fundamental principle. Even before *Ankeny v. Clark*, 148 U.S. at 353, in which a unanimous Court held it to be "an invariably true proposition" that one party's "refus[al] to perform" gives the other party "a right to elect to rescind" and "immediately sue on a quantum meruit for anything he had done under it previously to the rescission," this Court decided *Nash v. Towne*, 72 U.S. (5 Wall.) 689, 701-02 (1867):

> Where the seller of goods received the purchase-money at the agreed price, and subsequently refused to deliver the goods … it was held at a very early period that an action for money had and received would lie to recover back the money, and it has never been heard in a court of justice since that decision that there was any doubt of its correctness.

Other federal courts – including the Federal Circuit, *see Stone Forest Indus., Inc.*, 973 F.2d at 1550 – have likewise affirmed the right of an injured party to respond to a

repudiation by rescinding and obtaining restitution.[23] Indeed, cases like this, in which a party "has paid part or all of the price in advance for a performance that is not forthcoming," are "the clearest case[s] for restitution." III Farnsworth, *supra*, § 12.20, at 325; *see also* Frederic C. Woodward, *The Law of Quasi-Contracts* §262, at 412 (1913) ("[Restitution] has been invoked most frequently in the recovery of money paid.").

Departing from this unbroken line of established authority, the panel majority concluded that North Carolina's CZMA consistency objection was an independent and supervening "cause" of Mobil's loss that extinguished Mobil's right to restitution. The panel's reliance on the concept of causation was misplaced. Of course, a party seeking expectation damages is "limited to damages based on his actual loss *caused* by the breach." *Restatement (Second) of Contracts* § 347 cmt. e (emphasis added). "Recovery can be had only for loss that would not have occurred *but for* the breach." *Id.* (emphasis added). *See generally Hercules, Inc. v. United States*, 24 F.3d 188, 197 (Fed. Cir. 1994) (holding that, in a suit for expectation damages, a breach of contract plaintiff must show that its "damages were caused by the breach"), *aff'd*, 516 U.S. 417 (1996).

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23 *See, e.g., Elyea v. RCA Victor Co.*, 79 F.2d 759, 760 (5th Cir. 1935) (applying federal common law in the pre-*Erie* era); *Bu-Vi-Bar Petroleum Corp. v. Krow*, 40 F.2d 488, 490 (10th Cir. 1930) (same); *United Press Ass'n v. National Newspaper Ass'n*, 237 F. 547, 553 (8th Cir. 1916) (same). *See also Lee v. Foote*, 481 A.2d 484, 485-86 & nn. 3, 6 (D.C. 1984) (collecting state court decisions from numerous jurisdictions and holding that "[w]hen an express contract has been repudiated or materially breached by the defendant, restitution for the value of the non-breaching party's performance is available as an alternative to an action for damages on the contract").

But the question whether, in addition to the OBPA, the CZMA might also have prevented Mobil from ultimately realizing the full benefit of its lease agreement is irrelevant to Mobil's claim for *restitution*. Again, *Ankeny v. Clark*, 148 U.S. at 352 (emphasis added), is dispositive:

> [I]t seems plain that the plaintiff had a right to treat the contract as at an end, and to bring an action to recover the value of the wheat he had delivered to the defendant, and such other damages as he might have suffered by reason of that failure of the latter to perform his part of the contract; *and, a fortiori, that he might waive any demand for consequential damages, and confine his claim to a demand for the value of the wheat.*

Contract law scholars have likewise long affirmed that restitution relief is not concerned with "the damage suffered by the plaintiff *because of* the defendant's breach of contract," and that, in fact, "the damage suffered by the plaintiff is immaterial" to the restitution calculus, "the question being, not what the plaintiff suffered, but what did he give to the defendant in expectation of the performance of the contract by the defendant?" William A. Keener, *Treatise on the Law of Quasi-Contracts* 299 (1893) (emphasis added).

Given these clear statements of the irrelevance of causation to restitution relief, it is not surprising that none of the modern formulations of the rescission-and-restitution rule so much as hints that an aggrieved party must show that the breaching party's repudiation "caused" its loss. To the contrary, all make clear that the innocent party's right to rescind the contract and obtain restitution is absolute. *See, e.g., Restatement (Second) of Contracts* § 373 (stating that upon a repudiation an injured party is "entitled" to restitution of "any" benefit conferred); 5 Corbin, *supra*, § 1104, at 560

(stating that there is "no doubt" that a party may obtain restitution on a repudiation); II Farnsworth, *supra*, § 820, at 527 n.3 (stating that it is "clear" that a repudiation gives the injured party "an immediate claim to restitution").[24]

Nor is it surprising that recent federal cases similarly confirm that causation is irrelevant to claims for rescission and restitution. For example, in *Far West Federal Bank, S.B. v. OTS*, 119 F.3d 1358 (9th Cir. 1997), a group of investors agreed to recapitalize a failing thrift based on certain regulatory forbearances set forth in an agreement with the Federal Home Loan Bank Board. Congress later enacted the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA"), Pub. L. No. 101-73, 103 Stat. 183 (1989), which mandated regulatory action inconsistent with that agreement. The investors sued, seeking rescission of the agreement and restitution. In urging reversal on appeal of the district court's judgment for the investors, the Government argued that FIRREA had not caused the investors any economic harm because an injunction had "effectively shielded" them from "whatever adverse impact [they] might otherwise have suffered from FIRREA." *Far West*, 119 F.3d at 1365. The Ninth Circuit affirmed the district court, declaring that the Government's argument that FIRREA had not actually caused Far West's losses "misses the point." *Id.*

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[24] *Compare, e.g.*, III Farnsworth, *supra*, § 12.1, at 148-51 (discussing the "difficult problems of causation" posed by the expectation remedy), 3 Dan B. Dobbs, *Dobbs' Law of Remedies* § 12.4(2), at 65-69 (2d ed. 1993) (same), *and* 5 Corbin, *supra*, §§ 992, 997-1028, at 5-7, 19-175 (same), *with, e.g.*, III Farnsworth, *supra*, § 12.1, at 152-53 (discussing restitution relief without mentioning causation), *and* 3 Dobbs, *supra*, § 12.7(1), at 159-63 (same), and 5 Corbin, *supra*, § 996, 1102-1121, at 15-19, 548-652 (same).

> At the moment OTS announced its intention to impose FIRREA regulations on Far West, the Government repudiated the Conversion Agreement. Following repudiation, the Investors had the *absolute right* to cease their own performance and to obtain rescission and restitution.

Id. (emphasis added). Continuing, the Ninth Circuit reiterated that an injured party seeking restitution simply is not required to demonstrate that the breaching party's repudiation actually caused its losses: "FDIC's argument implies that the Investors would have to prove that they suffered consequential damages (*e.g.*, loss of their investment) in order to sue for breach. There is simply no basis in contract law for this proposition." *Id.*

B. Corollary Principles Of Contract Law Confirm That Causation Is Irrelevant To Claims For Rescission And Restitution.

In contract law, principles of causation are "often expressed in corollary rules rather than directly." 3 Dobbs, *supra*, § 12.4(2), at 68-69. Two such "corollary rules" further confirm the irrelevance of causation to a claim for restitution.

First, courts have long recognized that the requirement that a breach-of-contract plaintiff suing for traditional expectation damages show that he is "ready, willing, and able" to perform has no application in the restitution context. As one court put it, although in a suit for expectation damages a plaintiff "must tender and prove his own readiness, willingness, and ability to perform," a party seeking restitution need not make such a showing; rather, in an "action to rescind and recover payments made on account of the purchase price *it is enough to show a breach by the*

seller." *Weintraub v. Rungmar Realty Corp.*, 231 N.Y.S.2d 241, 244 (Sup. Ct. 1962) (emphasis added). In other words, a contract "may be rescinded, and purchase money paid in advance ... may be recovered back on the failure of one party to perform, even though the [complaining] party could not have performed." *Bigler v. Morgan*, 77 N.Y. 312, 318-19 (1879); *accord* 4 Corbin, *supra*, § 978, at 928 ("If the plaintiff could not have performed in any case, he will not be given damages for the defendant's failure to perform .... The rule is not quite the same with respect to the right to restitution of money paid or of the value of other benefits under the contract."). Thus, even where the complaining party's own inability to perform would have independently "caused" its losses under a contract, it is not barred from obtaining restitution of monies paid upon the breaching party's repudiation.

Second, where a defendant breaches what is, from the plaintiff's perspective, a losing contract, such that the plaintiff's expectation interest is zero, courts nonetheless allow the plaintiff to obtain restitution. The *Restatement (Second) of Contracts* is illustrative:

> A contracts to sell a tract of land to B for $100,000. After B has made a part payment of $20,000, A wrongfully refuses to transfer title. B can recover the $20,000 in restitution. *The result is the same even if the market price of the land is only $70,000, so that performance would have been disadvantageous to B.*

Restatement (Second) of Contracts § 373 illus. 1 (based on *Nash v. Towne*, 72 U.S. (5 Wall.) 689) (emphasis added); *accord* III Farnsworth, *supra*, § 12.20, at 325-26 ("If the injured party has paid part or all of the price in advance for a performance that is not forthcoming, that party can get

restitution of what has been paid ... even in the face of the contention by the party in breach that, had the performance been rendered, its value ... would have been less than [that] price," citing the "venerable case" of *Bush v. Canfield*, 2 Conn. 485, 488 (1818)).

In the losing-contract situation, there is clearly an independent "cause" of the plaintiff's loss – for example, market forces that have, from the plaintiff's perspective, diminished or destroyed the value of the contract. Nonetheless, courts permit a losing-contract plaintiff to obtain restitution upon a defendant's breach. Indeed, the Federal Circuit's own decision in *Stone Forest*, 973 F.2d at 1553, recognized this principle in awarding restitution of monies paid upon the Government's repudiation of a timber contract, even though the trial court had found that the plaintiff had not sought "traditional breach of contract damages" because "it could prove none," *Stone Forest Indus., Inc. v. United States*, 22 Cl. Ct. 489, 494 & n.7 (1991). *See also Acme Process Equip. Co. v. United States*, 347 F.2d 509, 528 (Ct. Cl. 1965) (holding that a contractor was entitled to restitution notwithstanding the Government's contention that the contractor would have sustained huge losses had the contract been performed), *rev'd on other grounds*, 385 U.S. 138 (1966).

C. The Policies And Purposes Underlying Restitution Confirm That Causation Is Irrelevant To Claims For Rescission And Restitution.

The Federal Circuit's "no harm, no foul" causation approach fundamentally misconceives the nature of restitution. As noted above, causation *is* relevant to a breach of contract claim for traditional "expectation" damages. *See* p. 26, *supra*. Expectation damages are forward-looking; their object is to give the aggrieved party "the benefit of his

bargain," *Restatement (Second) of Contracts* § 347 cmt. a, and to put that party "in as good a position as he would have been in had the contract been performed, that is, had there been no breach," *id.* § 344 cmt. a. Hence, if some factor external to the contract – some independent "cause" – would have prevented the plaintiff from realizing any benefit under the contract, then the plaintiff's expectation interest, irrespective of the defendant's breach, is zero, and no expectation damages are due.

In holding that causation is likewise a prerequisite to a claim for restitution, the Federal Circuit either misapprehended or papered over a fundamental distinction between expectation damages and restitution relief. As Professor Woodward reported in his seminal treatise, one of the animating forces that drove early common law judges to permit breach-of-contract plaintiffs to elect restitution was a desire to *avoid* the difficult issues of causation that attended the expectation measure of damages. Quoting Lord Mansfield's famous proclamation that "I am a great friend of the action for money had and received; it is a very beneficial action, and founded on principles of eternal justice,"[25] Woodward observed that

> the probable reason for permitting an election [of restitution was] a feeling that the plaintiff had at least lost his money and that the return of his money was a simpler adjustment of rights than the assessment of the damages suffered by the plaintiff as a result of the refusal of the defendant to perform his contract.

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25 *Towers v. Barrett*, 99 Eng. Rep. 1014, 1015 (1786).

Woodward, *supra*, § 262, at 411-12. It is as clear today as it was in Mansfield's time that, unlike the expectation measure of damages, restitution does *not* "attempt[] to compensate [the injured party] for consequential harms." 5 Corbin, *supra*, § 1102, at 548; *accord Ankeny*, 148 U.S. at 352 (distinguishing between restitution relief and "consequential harms" that are "suffered by reason of" defendant's breach); *Far West*, 119 F.3d at 1365 (holding that a party seeking restitution need not show "that [he] suffered consequential damages").

Restitution serves the twin purposes of (1) restoring the contracting parties to the position they occupied before the contract was made and (2) preventing "unjust enrichment" by forcing the breaching party to disgorge benefits unlawfully obtained. *See* Corbin, *supra*, § 1107, at 573 ("[I]n enforcing restitution, the purpose is to require the wrongdoer to restore what he has received and thus tend to put the injured party in as good a position as that occupied by him before the contract was made."). Neither of these purposes provides any role for "causation."

1. Restitution does not seek to put the parties in the position they would have been in had the contract been performed, but rather seeks to "place both of the parties in the position they had prior to entering into the transaction." John D. Calamari & Joseph M. Perillo, *The Law of Contracts* § 15.1, at 599 (4th ed. 1998); *see also Ballou v. Billings*, 136 Mass. 307, 309 (1884) (Holmes, J.) ("Rescission ... annihilates the contract, and puts the parties in the same position as if it had never been made."). Thus, the restitution remedy serves to "restor[e] ... the status quo ante as far as is practicable." 12 Samuel Williston, *A Treatise on the Law of Contracts* § 1455, at 20 (3d ed. Walter H.E. Jaeger, ed., 1968) (quoting *Alder v. Drudis*, 182 P.2d 195, 202 (Cal. 1947)); *see also Tull v. United States*, 481 U.S. 412, 424 (1987) (restitution is concerned with "restoring the status quo

and ordering the return of that which rightfully belongs to the purchaser or tenant") (quoting *Porter v. Warner Holding Co.*, 328 U.S. 395, 402 (1946)). Put simply, restitution is "chiefly employed for the unwinding of contracts." John P. Dawson, *Unjust Enrichment* 112 (1951). Given restitution's focus on the time of contracting (here, 1981), it is irrelevant whether some impediment that arose after the contract was made might have frustrated Mobil's ability to explore for, develop, and produce oil and gas on its leases.

The Federal Circuit's opinion reveals its basic misunderstanding of this "contract unwinding" function of the restitution remedy. In denying Mobil's claim, the court observed that it found "no principled distinction" between a lessee whose "hopes for large rewards" are frustrated by a CZMA objection and a lessee "whose hopes are drowned by impossible weather, equipment failures, [or] financial setbacks." Pet. App. 15a. The panel majority's logic might have had some force if directed to a claim for expectation damages. (Indeed, the panel majority's reference to Mobil's "hopes for large rewards" reveals its misunderstanding of the nature of Mobil's claim.) But this case is not about Mobil's supposed "hopes for large rewards"; rather, it is about Mobil's right to reimbursement of the sum certain it paid the Government in 1981. And while "impossible weather" might have frustrated Mobil's *expectation* interest, it could not have affected in any way Mobil's $78 million *restitution* interest – its interest in being returned to the status quo ante, *i.e.*, the position it occupied in 1981, prior to the time of contracting.

2. Restitution also seeks "to prevent unjust enrichment of the party in breach." III Farnsworth, *supra*, § 12.19, at 319; *accord Restatement (Second) of Contracts* § 373 cmt. a (noting that the primary purpose of restitution is to "prevent the unjust enrichment of the [breaching] party"). Thus, restitution is not primarily concerned with the *loss* suffered by the *injured* party – it is concerned instead with

the *gain* unlawfully received by the *breaching* party. "[N]o principle in the law of restitution is more clear than this." *Rapaport v. United States Dep't of the Treasury*, 59 F.3d 212, 217 (D.C. Cir. 1995); *see also* Dobbs, *supra*, § 12.7(1), at 160 ("A damages award focuses on the victim's loss and seeks compensation (or partial compensation); the restitution award focuses on the breacher and seeks to prevent his unjust enrichment by forcing restitution of gains he received under the contract."); Keener, *supra*, at 299 ("[T]he damage suffered by the plaintiff is immaterial, the question being, not what has the plaintiff suffered, but what did he give to the defendant in expectation of the performance of the contract by the defendant?").

III. THE FEDERAL CIRCUIT ERRONEOUSLY CONCLUDED THAT THE REPEAL OF THE OBPA CURED THE GOVERNMENT'S BREACH.

As noted above, pp. 10, 16-17, 21, the OBPA introduced new and unanticipated regulatory hurdles not only for Mobil's first POE for the Manteo area, but also for *every* subsequent permit that Mobil would ever need to delineate oil and gas resources and ultimately to produce such resources and transport them to shore. Mobil argued below that North Carolina's CZMA objection pertained only to the first POE for the area and was based upon a purported lack of environmental studies which, once conducted, would clear the path for later exploration, development, and production. Accordingly, even if the CZMA objection were regarded as the cause of the delay inherent in obtaining approval of the first POE, it would not excuse the material breach caused by the OBPA.

The panel majority rejected Mobil's characterization of the OBPA as a "continuing open-ended prohibition of *any* exploration of the North Carolina OCS and *any* development

and production of oil and gas resources in that area," by observing that North Carolina's CZMA objection "resulted in a delay that preceded and extended throughout *the period in which the OBPA was effective*." App. 13a (emphasis added). This vital underpinning of the court of appeals' decision – that, in the light of the CZMA, the OBPA was not the exclusive cause of Mobil's inability to explore its leases – can only be understood as resting upon the premise that the 1996 repeal of the OBPA during the pendency of North Carolina's CZMA objection (but three-and-a-half years after Mobil filed suit) effectively nullified the anticipatory repudiation that arose with the enactment of the OBPA. This holding of the Federal Circuit, like its reliance on causation, defies settled law.[26]

It is, of course, true that "[t]he effect of a statement as constituting a repudiation ... is nullified by a retraction of the statement ...." *Restatement (Second) of Contracts* § 256. However, a retraction is effective only "if notification ... comes to the attention of the injured party before he materially changes his position in reliance on the repudiation or indicates to the other party that he considers the repudiation to be final." *Id.* Dispositive here, "[t]he bringing of a suit by the promisee for the anticipatory breach is one sort of reliance making retraction impossible." 4 Corbin, *supra*, § 980, at 931; *accord* 11 Williston, *supra*, § 1335, at 182-83 ("If ... the contract has been totally rescinded, or an action has been brought ... such withdrawal is ineffectual.").

Federal and state courts agree that by filing suit an injured party cuts off a breaching party's right to retract its anticipatory repudiation. *See, e.g.*, *United States v. Seacoast*

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[26] It also ignores the legislative history of the OBPA's repeal and 1 U.S.C. § 109. *See* p. 14 n.13, *supra*.

Gas Co., 204 F.2d 709, 711 (5th Cir. 1953) ("All that is required to close the door to repentance is definite action indicating that the anticipatory breach has been accepted as final, and this requisite can be supplied ... by the filing of a suit ...."); *Lake Erie Distribs., Inc. v. Martlet Importing Co.*, 634 N.Y.S.2d 599, 601 (App. Div. 1995) (same).

Mobil brought suit on October 28, 1992, claiming that the OBPA breached its leases. The OBPA was repealed on April 26, 1996. *See* p. 1, *supra*. That action was far too late to "cure" the anticipatory repudiation that occurred when the OBPA was enacted.

IV. THE FEDERAL CIRCUIT'S DECISION IS INCONSISTENT WITH *WINSTAR*.

One of the principal concerns animating this Court's decision in *Winstar* was the need to protect "the Government's own long-run interest as a reliable contracting partner in the myriad workaday transactions of its agencies." *Winstar*, 518 U.S. at 883. That interest is best served, this Court concluded, by "treat[ing the Government] just like a private party in its contractual dealings," *id.* at 887 n.32, and requiring the "[p]unctilious fulfillment of contractual obligations," which is "essential to the maintenance of the credit of public as well as private debtors," *id.* at 884-85 (quoting *Lynch v. United States*, 292 U.S. 571, 580 (1934)) (internal quotation marks omitted). By contrast, as this Court recognized, a rule "expanding the Government's opportunities for contractual abrogation" will have "the certain result of undermining the Government's credibility at the bargaining table and increasing the cost of its engagements." *Id.* at 884.

This case presents the very dangers that this Court warned against in *Winstar*. The Federal Circuit's decision gives the Government a strong incentive to breach

agreements that become either politically unpopular or financially unprofitable because parties contracting with the Government are almost always subject to various forms of regulation. *Cf. Winstar*, 518 U.S. at 886 (rejecting a rule that would "compromise the Government's capacity as a reliable, straightforward contractor whenever the subject matter of a contract might be subject to subsequent regulation, *which is most if not all of the time*") (emphasis added). The decision below frees the Government, at its discretion, to take advantage of its regulated contracting partners by (1) restructuring and even repudiating its agreements, (2) offering as a post hoc rationalization for its action that some "other" statute or regulation (like the CZMA) served as an independent and supervening "cause" of the innocent parties losses, and (3) keeping any up-front payment, however substantial, that those parties might have paid as a precondition to contracting. The Federal Circuit's rule would therefore cast into doubt thousands of existing government contracts involving billions of dollars. *See* Pet. pp. 20-23.

In addition, the Government's ability under the Federal Circuit's unprecedented rule unilaterally to disturb settled property rights would give private parties a distinct disincentive to enter into *future* government contracts. As the Court of Federal Claims found,

> common sense suggests that no sophisticated oil and gas company with many years of experience in drilling for oil in offshore leased tracts would knowingly agree to pay the huge, up-front considerations here involved for such tenuous and unilaterally interruptible drilling rights.

Pet. App. 63a. To paraphrase this Court's decision in *Winstar*, "[i]njecting the opportunity for [causation] litigation into every [restitution] action would … produce the untoward

result of compromising the Government's practical capacity to make contracts, which we have held to be 'of the essence of sovereignty' itself." *Winstar*, 518 U.S. at 884 (quoting *United States v. Bekins*, 304 U.S. 27, 51-52 (1938)).

CONCLUSION

For the reasons stated above, the judgment of the Federal Circuit should be reversed.

Respectfully submitted,

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STATUTORY ADDENDUM

SEC. 6003. OUTER BANKS PROTECTION.

(a) SHORT TITLE.—This section may be cited as the "Outer Banks Protection Act".

(b) FINDINGS.—The Congress finds that—

(1) the Outer Banks of North Carolina is an area of exceptional environmental fragility and beauty;

(2) the annual economic benefits of commercial and recreational fishing activities to North Carolina, which could be adversely affected by oil or gas development offshore the State's coast, exceeds $1,000,000,000;

(3) the major industry in coastal North Carolina is tourism, which is subject to potentially significant disruption by offshore oil or gas development;

(4) the physical oceanographic characteristics of the area offshore North Carolina between Cape Hatteras and the mouth of the Chesapeake Bay are not well understood, being affected by Gulf Stream western boundary perturbations and accompanying warm filaments, warm and cold core rings which separate from the Gulf Stream, wind stress, outflow from the Chesapeake Bay, Gulf Stream meanders, and intrusions of Virginia coastal waters around and over the Diamond shoals;

(5) diverse and abundant fisheries resources occur in the western boundary area of the Gulf Stream offshore North Carolina, but little is understood of the complex ecological relationships between the life histories of those species and their physical, chemical, and biological environment;

(6) the environmental impact statements prepared for Outer Continental Shelf lease sales numbered 56 (1981) and 78 (1983) contain insufficient and outdated environmental information from which to make decisions on approval of additional oil and gas leasing, exploration, and development activities;

(7) the draft environmental report, dated November 1, 1989, and the preliminary final environmental report dated June 1, 1990, prepared pursuant to a July 14, 1989 memorandum of understanding between the State of North Carolina, the Department of the Interior, and the Mobil Oil Company, have not allayed concerns about the adequacy of the environmental information available to determine whether to proceed with additional offshore leasing, exploration, or development offshore North Carolina; and

(8) the National Research Council report entitled "The Adequacy of Environmental Information for Outer Continental Shelf Oil and Gas Decisions: Florida and California", issued in 1989, concluded that—

(A) information with respect to those States, which have received greater scrutiny than has North Carolina, is inadequate; and

(B) there are serious generic defects in the Minerals Management Service's methods of environmental analysis,

reinforcing concerns about the adequacy of the scientific and technical information which are the basis for a decision to lease additional tracts or approve an exploration plan offshore North Carolina, especially with respect to oceanographic, ecological, and socioeconomic information.

(c) PROHIBITION OF OIL AND GAS LEASING, EXPLORATION, AND DEVELOPMENT.—

(1) PROHIBITION.—The Secretary of the Interior shall not—

(A) conduct a lease sale;

(B) issue any new leases;

(C) approve any exploration plan;

(D) approve any development and production plan;

(E) approve any application for permit to drill; or

(F) permit any drilling,

for oil or gas under the Outer Continental Shelf Lands Act on any lands of the Outer Continental Shelf offshore North Carolina.

(2) BOUNDARIES.—For purposes of paragraph (1), the term "offshore North Carolina" means the area within the lateral seaward boundaries between areas offshore North Carolina and areas offshore—

(A) Virginia as provided in the joint resolution entitled "Joint resolution granting the consent of Congress to an agreement between the States of North Carolina and Virginia establishing their lateral seaward boundary" approved October 27, 1972 (86 Stat. 1298); and

(B) South Carolina as provided in the Act entitled "An Act granting the consent of Congress to the agreement between the States of North Carolina and South Carolina establishing their lateral seaward boundary" approved October 9, 1981 (95 Stat. 988).

(3) DURATION OF PROHIBITION.—

(A) IN GENERAL.—The prohibition under paragraph (1) shall remain in effect until the later of—

(i) October 1, 1991; or

(ii) 45 days of continuous session of the Congress after submission of a written report to the Congress by the Secretary of the Interior, made after consideration of the findings and recommendations of the Environmental Sciences Review Panel under subsection (e)—

(I) certifying that the information available, including information acquired pursuant to subsection (d), is sufficient to enable the Secretary to carry out his responsibilities under the Outer Continental Shelf Lands Act with respect to authorizing the activities described in paragraph (1); and

(II) including a detailed explanation of any differences between such certification and the findings and recommendations of the Environmental Sciences Review Panel under subsection (e), and a detailed justification of each such difference.

(B) CONTINUOUS SESSION OF CONGRESS.—In computing any 45-day period of continuous session of Congress under subparagraph (A)(ii)—

(i) continuity of session is broken only by an adjournment of the Congress sine die; and

(ii) the days on which either House of Congress is not in session because of an adjournment of more than 3 days to a day certain are excluded.

(d) ADDITIONAL ENVIRONMENTAL INFORMATION.—The Secretary of the Interior shall undertake ecological and socioeconomic studies, additional physical oceanographic studies, including actual field work and the correlation of existing data, and other additional environmental studies, to obtain sufficient information about all significant conditions, processes, and environments which influence, or may be influenced by, oil and gas leasing, exploration, and development activities offshore North Carolina to enable the Secretary to carry out his responsibilities under the Outer Continental Shelf Lands Act with respect to authorizing the activities described in subsection (c)(1). During the time that the Environmental Sciences Review Panel established under subsection (e) is in existence, the Secretary of the Interior shall consult with such Panel in carrying out this subsection.

(e) ENVIRONMENTAL SCIENCES REVIEW PANEL.—

(1) ESTABLISHMENT AND MEMBERSHIP.—There shall be established an Environmental Sciences Review Panel, to consist of—

(A) 1 marine scientist selected by the Secretary of the Interior;

(B) 1 marine scientist selected by the Governor of North Carolina; and

(C) 1 person each from the disciplines of physical oceanography, ecology, and social science, to be selected jointly by the Secretary of the Interior and the Governor of North Carolina from a list of individuals nominated by the National Academy of Sciences.

(2) FUNCTIONS.—Not later than 6 months after the date of the enactment of this Act, the Environmental Sciences Review Panel shall—

(A) prepare and submit to the Secretary of the Interior findings and recommendations—

(i) assessing the adequacy of available physical oceanographic, ecological, and socioeconomic information in enabling the Secretary to carry out his responsibilities under the Outer Continental Shelf Lands Act with respect to authorizing the activities described in subsection (c)(1); and

(ii) if such available information is not adequate for such purposes, indicating what additional information is required to enable the Secretary to carry out such responsibilities; and

(B) consult with the Secretary of the Interior as provided in subsection (d).

(3) EXPENSES.—Each member of the Environmental Sciences Review Panel shall be reimbursed for actual travel expenses and shall receive per diem in lieu of subsistence for each day such member is engaged in the business of the Environmental Sciences Review Panel.

(4) TERMINATION.—The Environmental Sciences Review Panel shall be terminated after the

submission of all findings and recommendations required under paragraph (2)(A).

(f) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated to the Secretary of the Interior to carry out this section not to exceed $500,000 for fiscal year 1991, to remain available until expended.

OUTER CONTINENTAL SHELF LANDS ACT.

43 U.S.C. § 1334. Administration of leasing

(a) Rules and regulations; amendment; cooperation with State agencies; subject matter and scope of regulations

The Secretary shall administer the provisions of this subchapter relating to the leasing of the outer Continental Shelf, and shall prescribe such rules and regulations as may be necessary to carry out such provisions. * * * The regulations prescribed by the Secretary under this subsection shall include, but not be limited to, provisions—

(1) for the suspension or temporary prohibition of any operation or activity, including production, pursuant to any lease or permit (A) at the request of a lessee, in the national interest, to facilitate proper development of a lease or to allow for the construction or negotiation for use of transportation facilities, or (B) if there is a threat of serious, irreparable, or immediate harm or damage to life (including fish and other aquatic life), to property, to any mineral deposits (in areas leased or not leased), or to the marine, coastal, or human environment, and for the extension of any permit or lease affected by suspension or prohibition under clause (A) or (B) by a period equivalent to the period of such suspension or prohibition, except that no permit or lease shall be so extended when such suspension or prohibition is the result of gross negligence or willful violation of such lease or permit, or of regulations issued with respect to such lease or permit;

(2) with respect to cancellation of any lease or permit—

(A) that such cancellation may occur at any time, if the Secretary determines, after a hearing, that—

(i) continued activity pursuant to such lease or permit would probably cause serious harm or damage to life (including fish and other aquatic life), to property, to any mineral (in areas leased or not leased), to the national security or defense, or to the marine, coastal, or human environment;

(ii) the threat of harm or damage will not disappear or decrease to an acceptable extent within a reasonable period of time; and

(iii) the advantages of cancellation outweigh the advantages of continuing such lease or permit in force;

(B) that such cancellation shall not occur unless and until operations under such lease or permit shall have been under suspension, or temporary prohibition, by the Secretary, with due extension of any lease or permit term continuously for a period of five years, or for a lesser period upon request of the lessee;

(C) that such cancellation shall entitle the lessee to receive such compensation as he shows to the Secretary as being equal to the lesser of (i) the fair value of the canceled rights as of the date of cancellation, taking account of both anticipated revenues from the lease and anticipated costs, including costs of compliance with all applicable regulations and operating orders, liability for cleanup costs or

damages, or both, in the case of an oilspill, and all other costs reasonably anticipated on the lease, or (ii) the excess, if any, over the lessee's revenues, from the lease (plus interest thereon from the date of receipt to date of reimbursement) of all consideration paid for the lease and all direct expenditures made by the lessee after the date of issuance of such lease and in connection with exploration or development, or both, pursuant to the lease (plus interest on such consideration and such expenditures from date of payment to date of reimbursement), except that (I) with respect to leases issued before September 18, 1978, such compensation shall be equal to the amount specified in clause (i) of this subparagraph; and (II) in the case of joint leases which are canceled due to the failure of one or more partners to exercise due diligence, the innocent parties shall have the right to seek damages for such loss from the responsible party or parties and the right to acquire the interests of the negligent party or parties and be issued the lease in question ...

* * *

43 U.S.C. § 1337. Grant of leases by Secretary

(b) Terms and provisions of oil and gas leases

An oil and gas lease issued pursuant to this section shall—

* * *

(4) entitle the lessee to explore, develop, and produce the oil and gas contained within the lease

area, conditioned upon due diligence requirements and the approval of the development and production plan required by this subchapter ...

* * *

43 U.S.C. § 1340. Geological and geophysical explorations

(c) Plan approval; State concurrence; plan provisions

(1) Except as otherwise provided in this subchapter, prior to commencing exploration pursuant to any oil and gas lease issued or maintained under this subchapter, the holder thereof shall submit an exploration plan to the Secretary for approval. Such plan may apply to more than one lease held by a lessee in any one region of the outer Continental Shelf, or by a group of lessees acting under a unitization, pooling, or drilling agreement, and shall be approved by the Secretary if he finds that such plan is consistent with the provisions of this subchapter, regulations prescribed under this subchapter, including regulations prescribed by the Secretary pursuant to paragraph (8) of section 1334(a) of this title, and the provisions of such lease. The Secretary shall require such modifications of such plan as are necessary to achieve such consistency. The Secretary shall approve such plan, as submitted or modified, within thirty days of its submission, except that the Secretary shall disapprove such plan if he determines that (A) any proposed activity under such plan would result in any condition described in section 1334(a)(2)(A)(i) of this title, and (B) such proposed activity cannot be modified to avoid such condition. If the Secretary disapproves a plan under

the preceding sentence, he may, subject to section 1334(a)(2)(B) of this title, cancel such lease and the lessee shall be entitled to compensation in accordance with the regulations prescribed under section 1334(a)(2)(C)(i) or (ii) of this title.

(2) The Secretary shall not grant any license or permit for any activity described in detail in an exploration plan and affecting any land use or water use in the coastal zone of a State with a coastal zone management program approved pursuant to section 1455 of Title 16, unless the State concurs or is conclusively presumed to concur with the consistency certification accompanying such plan pursuant to section 1456(c)(3)(B)(i) or (ii) of Title 16, or the Secretary of Commerce makes the finding authorized by section 1456(c)(3)(B)(iii) of Title 16.

* * *

43 U.S.C. § 1346. Environmental studies

(a) Information for assessment and management of impacts on environment; time for study; impacts on marine biota from pollution or large spills

(1) The Secretary shall conduct a study of any area or region included in any oil and gas lease sale or other lease in order to establish information needed for assessment and management of environmental impacts on the human, marine, and coastal environments of the outer Continental Shelf and the coastal areas which may be affected by oil and gas or other mineral development in such area or region.

* * *

(d) Consideration of relevant environmental information in developing regulations, lease conditions and operating orders

The Secretary shall consider available relevant environmental information in making decisions (including those relating to exploration plans, drilling permits, and development and production plans), in developing appropriate regulations and lease conditions, and in issuing operating orders.

* * *

43 U.S.C. § 1351. Oil and gas development and production

(h) Approval, disapproval or modification of plan; reapplication; periodic review

* * *

(1)(B) if any of the activities described in detail in the plan for which a Federal license or permit is required and which affects any land use or water use in the coastal zone of a State with a coastal zone management program approved pursuant to section 306 of the Coastal Zone Management Act of 1972 (16 U.S.C. 1455) do not receive concurrence by such State with respect to the consistency certification accompanying such plan pursuant to section 307(c)(3)(B)(i) or (ii) of such Act [16 U.S.C.A. S 1456(c)(3)(B)(i) or (ii)] and the Secretary of Commerce does not make the finding authorized by section 307(c)(3)(B)(iii) of such Act [16 U.S.C.A. S 1456(c)(3)(B)(iii)];

* * *

(2)(A) If a plan is disapproved—

* * *

(ii) under subparagraph (B) of paragraph (1) with respect to a lease issued after approval of a coastal zone management program pursuant to the Coastal Zone Management Act of 1972 (16 U.S.C. 1455), the lessee shall not be entitled to compensation because of such disapproval.

* * *

(C) Upon expiration of the five-year period described in subparagraph (B) of this paragraph, or, in the Secretary's discretion, at an earlier time upon request of a lessee, if the Secretary has not approved a plan, the Secretary shall cancel the lease and the lessee shall be entitled to receive compensation in accordance with section 1334(a)(2)(C) of this title. The Secretary may, at any time within the five-year period described in subparagraph (B) of this paragraph, require the lessee to submit a development and production plan for approval, disapproval, or modification. If the lessee fails to submit a required plan expeditiously and in good faith, the Secretary shall find that the lessee has not been duly diligent in pursuing his obligations under the lease, and shall immediately initiate procedures to cancel such lease, without compensation, under the provisions of section 1334(c) of this title.